RECORD AND BRIEFS

No. 16-399

Supreme Court, U.S.
FILED
MAR - 3 2016
OFFICE OF TH

In The
Supreme Court of the United States

ANTHONY W. PERRY,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The D.C. Circuit

BRIEF OF *AMICUS CURIAE* METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION (MWELA) IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Metropolitan Washington Employment Lawyers Association (MWELA), submits this *amicus curiae* brief with the consent of the parties,[1] in support of Petitioner's argument that mixed cases dismissed by the Merit Systems Protection Board (MSPB) on jurisdictional grounds are entitled to *de novo* review in federal district court. MWELA has been at the forefront of advocacy before the courts to achieve equal employment opportunity for men and women from diverse communities and to uphold essential protections against workplace discrimination. MWELA seeks to ensure that laws passed by Congress, attempting to secure equal employment opportunity, are interpreted consistent with the plain language of the statute, in conformity with the law's purpose and legislative intent. This case, involving the right to have discrimination claims brought by federal employees heard *de novo* in federal district courts when the discrimination claim has been dismissed on jurisdictional grounds, is a matter of significant concern to MWELA and will directly affect the rights of those they serve.

MWELA, a professional association of over 330 attorneys, is the local affiliate of the National Employment

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[1] Pursuant to Sup. Ct. R. 37.6, *Amicus* submits that no counsel for any party participated in the authoring of this document, in whole or in part. In addition, no other person or entity, other than *Amicus*, has made any monetary contribution to the preparation and submission of this document. Pursuant to Sup. Ct. R. 37.2 and 37.3(a), the Petitioner's universal consent has been filed with the Clerk of the Court. The Respondent consented to the filing of this brief in a letter dated March 1, 2017.

Lawyers Association (NELA), the largest professional membership organization in the country comprised of lawyers who represent workers in employment, labor, and civil rights disputes. MWELA's members represent numerous federal government employees, generating the interest in the issues raised by this case.

MWELA respectfully submits this *amicus* brief to aid the Court in addressing whether a MSPB decision disposing of a "mixed" case appeal on jurisdictional grounds is subject to judicial review in federal district court or in the U.S. Court of Appeals for the Federal Circuit.

The disposition of this issue will have an important effect on the ability of federal employees to enforce their statutory rights to bring discrimination complaints in the federal sector administrative process under the Civil Service Reform Act of 1978 (CSRA). For these important reasons, MWELA respectfully submits this *amicus* brief.

SUMMARY OF ARGUMENT

The legislative history of the Civil Service Reform Act of 1978 (CSRA), PUB. L. NO. 95-454, 92 Stat. 1211 (codified in scattered sections of 5 U.S.C.), sound public policy, and the plain language[2] of the Act dictate that a federal employee alleging workplace discrimination

[2] The plain language of the statute is discussed in detail at pages 12-17 of the Brief for Petitioner.

has an unqualified right to seek trial *de novo* in federal district court after *any* final order or decision by the MSPB.

The CSRA, as a whole, is not the clearest of statutes. It is replete with complicated procedural requirements that often frustrate federal employees who seek to vindicate their rights without the aid of experienced counsel. As the Court noted in *Kloeckner v. Solis*,

> the intersection of federal civil rights statutes and civil service law has produced a complicated, at times confusing, process for resolving claims of discrimination in the federal workplace. But even within the most intricate and complex systems, some things are plain . . . . [such as] where two sections of the CSRA, read naturally, direct employees like [Perry] to district court.

Kloeckner v. Solis, 133 S. Ct. 596, 603 (2012). Similarly, on the narrow issue presented here, the language of the statute and its intent is clear. The CSRA provides that once the MSPB has disposed of a federal employee's mixed claim, that employee may seek trial *de novo* in federal district court for his discrimination claim, regardless of the nature of the dismissal.

The legislative history of the CSRA confirms that Congress intended for mixed cases appealed from the MSPB to have *de novo* review in federal district court. Both the House and the Senate stressed the absolute right of *de novo* review in district court for discrimination claims, recognizing that such claims are

best adjudicated in district court. Significantly, in drafting the Federal Courts Improvement Act of 1982, PUB. L. NO. 97-164, Congress left intact the district courts' authority to adjudicate federal employees' employment discrimination claims.

Furthermore, sound public policy necessitates that mixed cases appealed from the MSPB should go before a federal district court. The federal district courts have been handling discrimination claims for nearly half a century. The district courts understand the complexities of such cases and are adept at addressing the procedural intricacies they present. Denying access to trial *de novo* in a district court for claims dismissed by the MSPB on jurisdictional grounds would unfairly punish employees for failing to navigate the "procedural maze," and incentivize employees to bypass the administrative procedures set up by Congress in the CSRA altogether. This interpretation would create the absurd outcome of denying any merits hearing to mixed case discrimination claims, depending whether the MSPB finds jurisdiction.[3]

Finally, a plain reading of the CSRA places jurisdiction for mixed case[4] appeals in federal district court.

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[3] This troubling result can be avoided in part through proper integration of Equal Employment Opportunity Commission (EEOC) administrative hearings into the process under 29 C.F.R. § 1614.302, as discussed in greater detail *infra* Section III.

[4] Mixed cases are those cases in which an employee claims both unlawful discrimination and a related "adverse employment action." *See Kloeckner*, 133 S. Ct. at 601 (citing 29 C.F.R. § 1614.302).

See Kloeckner, 133 S. Ct. at 607 n.4. The statute expressly directs that all mixed cases must be filed under applicable anti-discrimination statutes. 5 U.S.C. § 7703. The statutes referenced in the CSRA place jurisdiction for discrimination cases in federal district courts.[5] *See, e.g.*, 42 U.S.C. § 2000e-5(f)(3). The CSRA provides that when federal employees allege unlawful discrimination as a basis of an appealable action, their claims constitute "cases of discrimination" within the jurisdiction of the district court. *Cf.* 5 U.S.C. §§ 7702(a)(1)(B), 7703(b)(2). Once the MSPB has issued any final order or decision in the action, the case becomes a judicially reviewable action provided that the EEOC/Special Panel review process is not invoked. *See* 5 U.S.C. § 7702(a)(3). A MSPB dismissal on jurisdictional grounds constitutes a final order, which can and should be reviewed in district court. *See* 5 U.S.C. §§ 7702(a)(3), 7703(b)(2). The Court's reasoning in *Kloeckner* applies just as strongly whether the MSPB's decision is on procedural or jurisdictional grounds.

Given the Court's reasoning in *Kloeckner*, the correct resolution of this petition is clear. The Court should find that *de novo* review is available in federal district court for any federal employee whose mixed case has been dismissed on jurisdictional grounds by the MSPB.

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[5] The jurisdiction of the federal district courts is not exclusive. Under the Court's decision in *Yellow Freight Sys. v. Donnelly*, 494 U.S. 820, 821 (1990), cases can be filed in state trial courts that have the ability to hear the case *de novo*.

ARGUMENT

I. THE CSRA'S LEGISLATIVE HISTORY CONFIRMS THE CONGRESSIONAL INTENT TO SAFEGUARD THE RIGHT OF A FEDERAL EMPLOYEE ALLEGING WORKPLACE DISCRIMINATION TO SEEK TRIAL *DE NOVO* IN FEDERAL DISTRICT COURT.

The CSRA's legislative history confirms Congress' intent that mixed case appeals from the MSPB should be adjudicated in federal district court. In passing the CSRA, Congress sought to make the federal government more efficient by streamlining disciplinary procedures,[6] while simultaneously protecting federal employees' interests in cases of discrimination by ensuring a right to seek trial *de novo* in district court after agency action. Subsequent amendments to the CSRA in 1982, which established the Federal Circuit and simplified the process of judicial appeals of MSPB and EEOC actions, left intact the original 1978 provisions providing district courts with the jurisdiction to review discrimination claims by federal employees.

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[6] Objectives of the proposed reforms included "[t]o reduce the red tape and costly delay in the present personnel system" as well as "[t]o promote equal employment opportunity." H.R. REP. NO. 95-1403, at 99 (1978). The Senate Committee on Government Affairs echoed those contrasting concerns in its report when it called the civil service system "an outdated patchwork of statutes and rules" and addressed the need to "[a]llow civil servants to be able to be hired and fired more easily, *but for the right reasons*." S. REP. NO. 95-969, at 3, 4 (1978) (emphasis added).

A. The legislative history of the CSRA stressed the importance of the right of federal employees to have a hearing on the merits of discrimination claims.

Throughout deliberations on the CSRA, two points emerged: Congress intended to ensure fair hearings of federal-sector employment discrimination complaints, and these hearings were to be *de novo* in federal district court. One of the managers of H.R. 11280, Representative William D. Ford, reiterated an employee's right to a hearing on the merits: "[T]itle II of the act . . . sets forth procedures for disciplining and discharging employees. . . . [T]he employee has an absolute statutory right to a hearing, unless he or she waives that right." Remarks of Rep. William D. Ford, 124 CONG. REC. H13, 610 (Daily Edition, October 14, 1978), reprinted in H. COMM. ON POST OFFICE AND CIVIL SERVICE, 96TH CONG., LEGISLATIVE HISTORY OF THE CIVIL SERVICE REFORM ACT OF 1978, Comm. Print No. 96-2 vol. 2, at 2014 (1979); *see* H.R. 11280, 95th Cong. (1978). Another manager, Representative William Clay, stressed that the "testimony from over 40 witnesses . . . was overwhelmingly in support of the thrust of the [proposed] legislation because the existing program was . . . lacking in the opportunity for judicial review of decisions of the Federal labor relations council." 124 CONG. REC. H8466 (Sept. 11, 1978). Representative Clay's remarks underscore that the need to ensure judicial review was one of the reasons why Congress undertook reform of civil service disciplinary procedures in 1978.

During the consideration of the CSRA, Representative Clay offered an amendment "at the request of the Equal [Employment] Opportunity Commission" to ensure "that a trial *de novo* remains available to complainants in discrimination cases." The House accepted the amendment after only limited debate. 124 CONG. REC. H9364 (Sept. 11, 1978); *see also* 124 CONG. REC. H9381-2 (Sept. 11, 1978). Thus, Congress understood and intended the CSRA to guarantee a merits hearing for claims arising from adverse actions based on unlawful discrimination.

B. Congress gave district courts jurisdiction to review discrimination complaints by federal employees because district courts have expertise in fact-finding and in adjudicating civil rights matters.

In their drafting and debate of the CSRA, both the House and Senate agreed that the district court is the appropriate forum to review mixed case appeals from the MSPB. When the Senate Committee on Governmental Affairs recommended S. 2640, which ultimately became law, the Committee explained that administrative decisions on discrimination claims should undergo review by federal district courts, rather than courts of appeals, because "[d]istrict court is a more appropriate place than the Court of Appeals for [review of administrative decisions on discrimination] cases since they may involve additional fact-finding." S. REP. NO. 95-969 at 63 (1978). Moreover, district courts already consider discrimination complaints from the private

sector. S. REP. NO. 95-969, at 63 (1978). Because of their extensive consideration of discrimination complaints, the district courts have special expertise in matters of employment discrimination that the Federal Circuit lacks.

The Committee further remarked that "suits brought pursuant to the anti-discrimination laws" are explicitly exempted from "the general requirement that employees appeal to the Court of Appeals or Court of Claims." S. REP. NO. 95-969, at 63 (1978). According to the Committee, "if an employee decides to resort to district court after the [MSPB] issues a new decision and order, or reconfirms its original decision, after consideration by the Commission, *the otherwise automatic certification of the case to the Court of Appeals . . . may not go forward.*" *Id.* (emphasis added). This exception for discrimination claims appears in the text of the statute, which provides that "*except for actions filed under the antidiscrimination laws*, a petition to review a final order or decision of the Merit Systems Protection Board shall be filed in the U.S. Court of Appeals, or in the U.S. Court of Claims." H.R. REP. NO. 95-1717, at 142-43 (Conf. Rep.) (emphasis added); *see* 5 U.S.C. §§ 7703(b)(2), (c)(3).

The Conference Committee also recognized the propriety of discrimination claim review in district court. In the CSRA as enacted, an employee may both appeal an agency action to the MSPB and file a suit in district court, subject only to a waiting period:

> If the employee files an appeal of the agency action with MSPB, the employee may file suit in district court any time after 120 days if the Board has not completed action on the matter by that time . . . . [T]he act gives the employee the right to sue in district court 180 days after it petitions the EEOC to review the decision of the MSPB even if the administrative process is not completed by that time, as required by other provisions in the section.

H.R. REP. NO. 95-1717, at 141 (Conf. Rep.).

In its review of the CSRA since its passage, Congress has continued to support the right to *de novo* review of discrimination claims in district court. In 1982, for example, Congress revisited the CSRA when creating the Federal Circuit. Despite the push in Congress to further streamline appeals and to eliminate duplication, Congress maintained the statute's method of sending federal employment discrimination cases to federal district court.

The push for reform is apparent from the Senate Committee on the Judiciary's report recommending the Federal Courts Improvement Act. The report explained:

> In recent years, much confusion has been engendered by provisions of existing law that leave unclear which of two or more federal courts [] have subject matter jurisdiction over certain categories of civil actions. The problem has been particularly acute in the area of administrative law where misfilings [sic] and

> dual filings have become commonplace. The uncertainty *in some statutes* regarding which court has review authority creates an unnecessary risk that a litigant may find himself without a remedy because of a lawyer's error or a technicality of procedure.

S. REP. NO. 97-275, at 11 (1981) (emphasis added).

Congress' dissatisfaction with the confusing language of "some statutes" did not extend to the provisions for review of discrimination cases in the CSRA, as demonstrated by its lack of substantive changes to the statute. Aside from technical amendments to conform the CSRA to the Federal Circuit's existence, Congress made no changes through the Federal Courts Improvement Act to the path of review for discrimination cases. A hearing on the merits with *de novo* review in a district court is still available to employees who bring discrimination claims.

II. ENFORCING FEDERAL EMPLOYEES' RIGHTS TO TRIAL *DE NOVO* FOR DISCRIMINATION CLAIMS IN FEDERAL DISTRICT COURT FOSTERS USE OF THE ADMINISTRATIVE PROCESS AND DETERS A RUSH TO DISTRICT COURT.

Preserving the right to trial *de novo* of mixed cases in the federal district court furthers the interest of justice and fairness for claimants alleging unlawful discrimination. Failing to safeguard this right would have significant negative policy repercussions. A rule of law limiting access to trial *de novo* and excluding claims

dismissed by the MSPB on jurisdictional grounds from this statutorily prescribed remedy would result in three undesired outcomes: (1) it would encourage employees to bypass the administrative procedures set up by Congress in the CSRA to avoid the risk of being detoured into Federal Circuit proceedings; (2) it would unfairly punish employees for failing to navigate a "procedural maze," at times through no fault of their own; and (3) it would result in an illogical and erroneous interpretation of the CSRA that would deny any merits trial on employees' discrimination claims.

A. Denial of *de novo* review harms federal employees who use the CSRA's MSPB appeal process, creating an incentive to avoid the MSPB altogether due to the risks of denial of a merits hearing.

The CSRA offers employees a way to handle adverse federal employment issues, including those of discrimination, without necessarily having to retain legal counsel and ending up in federal district court. For example, comparing MSPB administrative hearings to court litigation under the Tucker Act, Justice Blackmun noted:

> An employee who is entitled to seek relief before the MSPB will have the opportunity to proceed in a far less formal atmosphere, without paying filing fees and other costs. Because the proceedings are less formal, the employee may be able to present his or her case

> competently without the assistance of an attorney.

See United States v. Fausto, 484 U.S. 439, 467 (1988) (Blackmun, J., concurring).

The opportunity for the MSPB to serve as a simplified administrative hearings venue (subject to *de novo* judicial review under the CSRA's statutory scheme) is thwarted if that judicial review process is subject to an additional complex step of possible appeals to the Federal Circuit. Additionally, the Federal Circuit's focus in its review is on the civil service law merits of the MSPB's decision to dismiss; nothing with regard to the employee's discrimination claim is subject to review by the Federal Circuit following a jurisdictional dismissal. These factors create a perverse incentive to drive cases out of the less formal administrative hearings process at the MSPB and into the district courts due to the risk of denial of a merits hearing, doing violence to the CSRA's integrated statutory scheme.

B. *De novo* review ensures that employees are not punished for failing to navigate a "procedural maze."

Both this Court and the lower courts have recognized the complexity involved in successfully navigating a mixed case through the CSRA's administrative requirements. As this Court observed in *Kloeckner*, "the intersection of federal civil rights statutes and civil

service law has produced a complicated, at times confusing, process for resolving claims of discrimination in the federal workplace." *Kloeckner*, 133 S. Ct. at 603. The Sixth Circuit has unfavorably described the process as a "procedural maze" and a "procedural morass." *Valentine-Johnson v. Roche*, 386 F.3d 800, 802, 805 (6th Cir. 2004). The D.C. Circuit has also labeled the navigation of the procedural process of the CSRA in mixed cases as a "complicated tapestry." *Id.* at 805 (quoting *Butler v. West*, 164 F.3d 634, 638-39 (D.C. Cir. 1999)). Lay federal employees initiating discrimination claims under the CSRA must deal with this complexity. As just one example of this procedural morass, a document entitled "Guide for *Pro Se* Petitioners and Appellants," found on the website for the U.S. Court of Appeals for the Federal Circuit, directs mixed case appellants who wish to preserve their federal discrimination claims to appeal a MSPB decision to the district court.[7]

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[7] This guide expressly states that the Federal Circuit "does not have jurisdiction to review cases involving bona fide claims of discrimination based on race, sex, age, national origin, or handicap that were raised before and considered by the Merit Systems Protection Board. If your case involves such claims and you are unwilling to abandon them forever, you must proceed in a district court (which will hear all your claims, both discrimination and nondiscrimination) or before the Equal Employment Opportunity Commission (which will hear your discrimination claims only)." *Guide for Pro Se Petitioners and Appellants*, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, http://www.cafc.uscourts.gov/sites/default/files/rules-of-practice/pro%20se.pdf (Last visited February 20, 2017).

The Court has repeatedly noted that complex remedial systems "must be accessible to individuals who have no detailed knowledge of the relevant statutory mechanisms and agency processes." *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 403 (2008) (citing *EEOC v. Commercial Office Prods. Co.*, 468 U.S. 107, 124 (1988)) (discussing the ADEA and Title VII "remedial schemes in which laypersons, rather than lawyers, are expected to initiate the process").[8] When employees appeal their cases to the MSPB under the "guidance" of the CSRA, they likely have little understanding of the CSRA's procedural requirements. As *Amicus* has observed, a substantial portion of employees in mixed cases proceed *pro se*. Congress intended the CSRA to protect the right of federal employees to assert discrimination claims.[9] Mechanisms to help abate some of that complexity in the interest of ensuring that mixed cases are heard on their merits are even built into the statute. *See, e.g.*, 5 U.S.C. § 7702(f) (savings provision for timeliness purposes for cases of erroneous filing in the incorrect forum). To punish, often *pro se*, federal employees who cannot grasp the statute's mechanisms – mechanisms which are sufficiently complex as to even challenge the courts at times – would undermine Congress' express intent.

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[8] As the Court observed, nothing in the record indicates that Congress intended federal employees to obtain counsel to navigate the process in the private sector. Thus, the same standard can be applied to the federal sector.

[9] *See supra* Section I.

Federal employees may be faultless in the events that culminate in the MSPB's jurisdictional dismissal of their claims. For example, in *Valentine-Johnson*, the appellant failed to meet the procedural requirements of a mixed case "because of erroneous advice given to her by the MSPB Administrative Judge . . . hearing her claims." *See Valentine-Johnson*, 386 F.3d at 802.[10] Specifically, the Administrative Judge (AJ) informed Valentine-Johnson that she could terminate her proceedings before the MSPB and proceed directly to federal district court. When Valentine-Johnson followed this instruction, the district court dismissed her claim for her failure to exhaust her administrative remedies with the MSPB. On appeal, the Sixth Circuit held that "principles of equity require that Valentine-Johnson's termination claim be heard in the district court." *Id.* at 811-12.

In *Harms v. I.R.S.*, the appellant's claim was dismissed because he failed to re-file his appeal to the MSPB immediately after regaining mental competency. *See Harms v. I.R.S.*, 321 F.3d 1001 (10th Cir. 2003). Harms was "involuntarily institutionalized," so the AJ dismissed his complaint without prejudice and set a date by which the complainant was required to re-file. *Id.* at 1004. If Harms was still not competent to file by this "re-file date," the AJ stated that Harms

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[10] *Amicus* recognizes that both *Valentine-Johnson* and *Harms* (discussed further *infra*) involved the appeal of procedural dismissals by the MSPB. However, an appellant whose claim was dismissed on jurisdictional grounds runs the same risk of an inequitable outcome as an appellant whose claim was dismissed on procedural grounds, as in these two cases.

could re-file after he regained mental competency. *Id.* Harms was not mentally competent as of the re-file date, so Harms re-filed after regaining competency. However, the AJ expected Harms to re-file his claim on the same day that he began taking anti-psychotic drugs again. *Id.* at 1005. Harms failed to do so, thus the AJ dismissed Harms' claim as untimely. Notably, the Tenth Circuit in *Harms* also rejected the Federal Circuit's pre-*Kloeckner* approach, and found that district court had jurisdiction for *de novo* hearing after MSPB dismissal even if the MSPB did not issue a merits determination on discrimination, so long as the employee alleged discrimination. *See id.* at 1008.

As *Valentine-Johnson* and *Harms* demonstrate, employee discrimination claims can be dismissed by the MSPB for a variety of reasons, some completely devoid of employee fault. If the CSRA's language guaranteeing *de novo* review of discrimination claims on appeal from the MSPB is to be honored in both letter and spirit, then an employee's failure to understand the CSRA's nuances should not preclude merits review.

Congress did not intend for a federal employee's right to a *de novo* trial in federal district court, when he alleges a mixed case claim, to depend on whether he guessed correctly on whether a possible dismissal would be on the merits, on a procedural technicality, or because of the amorphous concept of subject matter jurisdiction. Even experienced attorneys grapple with

this concept.[11] The process was intended to be a simplified process most often used by federal employees without the assistance of counsel. *See Holowecki*, 552 U.S. at 403.

The *Kloeckner* Court found that the government provided no reasoning which demonstrates Congress intended to create a "roundabout way of bifurcating judicial review" when it passed the CSRA. *Kloeckner*, 133 S. Ct. at 605. The Court's decision in *Kloeckner* put emphasis on the "judicially reviewable action" language of § 7702 of the CSRA, not whether that judicially reviewable action was procedural or jurisdictional. *Id.* The Court held that the first sentence of § 7703(b)(2) sends mixed cases to district court, and in doing so recognized that, contrary to the assertions of the federal government, the term "judicially reviewable action" was not a term of art. *Id.* Because it is not a term of art, the distinction between whether a mixed case was dismissed on procedural or jurisdictional grounds does not change which court the case should be sent to for review, as a dismissal based on either ground is a judicially reviewable action, a point the Federal Circuit overlooked in its decision in *Conforto v. MSPB*, 713 F.3d 1111 (Fed. Cir. 2013).

Instead of recognizing the Court's focus in *Kloeckner*, the majority in *Conforto* read the Court's decision

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[11] *See* Joseph W. Mead & Nicholas A. Fromherz, *Choosing a Court to Review the Executive*, 67 ADMIN. L. REV. 1 (2015) (explaining how difficult jurisdictional issues are generally).

on narrow grounds as concerning only procedural decisions. *Id.* at 1117. Not only does this run counter to the holding of *Kloeckner*, but both parties in *Kloeckner* recognized that there was no difference between procedural and jurisdictional decisions by the MSPB. Brief for Respondent at 25 n.3, *Kloeckner*, 133 S. Ct. 596 (2012) (stating that there was "no basis" in differentiating which court had review); Reply Brief for Petitioner at 2, *Kloeckner*, 133 S. Ct. 596. The dissent in *Conforto* noted that the majority disregarded this point, and also noted that the MSPB often dismisses cases using alternate grounds, meaning a case could be dismissed for *both* procedural and jurisdictional reasons. *Conforto*, 713 F.3d at 1124 (Dyk, J., dissenting). If the Court were to endorse the view that procedural appeals in mixed cases can go to district court but jurisdictional appeals can only be brought to the Federal Circuit, the practical effect would be to render unintelligible an already difficult system for plaintiffs to navigate.

The Court should not impose additional hurdles that hamper federal employees' rights to have their discrimination claims heard *de novo* in federal district court. Accordingly, *Amicus* requests that this Court reject the approach of the Federal Circuit in *Conforto* and of the D.C. Circuit below as contrary to *Kloeckner*.

C. *De novo* review in district court prevents an illogical and unintended outcome – discrimination claims being denied any trial on the merits.

In Petitioner's case, if the MSPB had decided the merits of the claim, Petitioner could have had the merits re-visited by appealing to federal district court and receiving *de novo* review. The MSPB failed to reach the merits of Petitioner's discrimination claim, however, instead dismissing the claim for lack of jurisdiction. Petitioner was permitted to appeal only the jurisdictional dismissal of his claim to the Federal Circuit, where *de novo* review is unavailable. Petitioner, therefore, has received no trial on the merits of his claim.

This result is not only illogical but also distorts the CSRA's language and intent. If the Federal Circuit upholds the MSPB's decision, then an employee whose claim is dismissed on jurisdictional grounds will never have the merits of the discrimination claim addressed, an outcome the Court rejected in *Kloeckner*. This result contradicts the language of the CSRA, which states that "in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial *de novo* by the reviewing court." 5 U.S.C. § 7703(c).

III. THE COURT SHOULD CONFIRM THAT *KLOECKNER* DOES NOT RESTRICT AN EMPLOYEE'S OTHER REVIEW RIGHTS PROVIDED UNDER THE CSRA AND ITS REGULATIONS.

The CSRA creates an administrative process that the government encourages, and sometimes directs, employees to utilize. Employees may wish to pursue resolution through these administrative remedies before resorting to litigation. Under the CSRA, employees are either directed to exhaust their administrative options first or are permitted to proceed to federal court without exhausting them. Employees are never directed nor encouraged to bypass the administrative process.

To avoid unnecessary confusion and possible future litigation, *Amicus* asks that the Court confirms that nothing in *Kloeckner* should be understood to restrict the right of federal employees with mixed case complaints to pursue further administrative remedies after receiving an unsatisfactory result from the MSPB – regardless of whether the MSPB's dismissal is based upon a ruling on the merits, a dismissal on jurisdictional grounds, or a dismissal on procedural grounds.

If a mixed case is dismissed by the MSPB on jurisdictional grounds, 29 C.F.R. § 1614.302[12] explicitly

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[12] 29 C.F.R. § 1614 was promulgated by the EEOC pursuant to its authority under 42 U.S.C. § 2000e-16(b) to "issue such rules,

gives federal employees the option of *de novo* review in federal district court. The regulations also require MSPB judges who dismiss mixed case complaints to advise employees that they may appeal the MSPB's rulings on discrimination issues to the EEOC as well. *Kloeckner* does not diminish the employees' rights to review provided in 29 C.F.R. § 1614.302.

Administrative hearings in the federal sector complaints process evolved over time; the administrative hearings process came first, and judicial review *de novo* in district court was added later.[13] The later enacted provision of judicial review in the CSRA was meant to supplement, not replace, this administrative

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regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section." Accordingly, as the Department of Justice's Office of Legal Counsel has held, these procedural regulations are distinct from the policy guidance accorded mere *Skidmore* deference under *EEOC v. Arabian American Oil Co., et al.*, 499 U.S. 244, 257 (1991), and should instead be accorded *Chevron* deference. *See* Legality of EEOC Class Action Regulations, Memorandum Opinion for the Vice President and the General Counsel of the United States Postal Service, 28 Op. O.L.C. 254, 261 n.3 (2004), https://www.justice.gov/file/18816/download; *accord*, Sant'Ambrogio, Michael D. and Zimmerman, Adam S., *Inside the Agency Class Action* (August 21, 2016). Yale Law Journal, Forthcoming; Loyola Law School, Los Angeles Legal Studies Research Paper No. 2016-32, at n.84, https://ssrn.com/abstract=2827187.

[13] As detailed by the EEOC in the historical portion of its Management Directive 110 (MD-110), the antecedents to the administrative hearings process predate Congress' passage of the major EEO statutes by several decades. *See* MD-110, Preamble, § I, https://www.eeoc.gov/federal/directives/md-110_preamble.cfm.

hearings process after a history of problematic implementation under the former Civil Service Commission. *See supra* at n.13.

As this Court has long recognized, Congress designed the CSRA as "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *See Fausto*, 484 U.S. at 445. 29 C.F.R. § 1614.302 is a crucial part of implementing Congress' integrated scheme under the CSRA, as it ensures that the administrative hearings process is allowed to occur in some forum (whether it be the EEOC or the MSPB), subject to *de novo* judicial review in federal district court.

The Court in *Kloeckner* described the CSRA as routing mixed cases dismissed on procedural grounds to federal district court in "crystalline fashion." *Kloeckner*, 133 S. Ct. at 604. This language reinforces the Court's holding that the relevant discrimination statutes route these dismissals to federal district court rather than an appellate court. This language does not preempt the availability of an administrative hearing first, then later subject to *de novo* judicial review in federal district court. Accordingly, *Amicus* asks the Court to confirm that, prior to the case being subject to *de novo* judicial review in federal district court, federal employees retain their right under the CSRA to an administrative hearing before a tribunal of competent jurisdiction.

It appears that Petitioner's decision to appeal the MSPB's decision below was driven by the notice of appeal rights provided to him by the MSPB below. *See Perry v. Dept. of Commerce*, MSPB Docket Nos. DC-0752-12-0486-B-1, DC-0752-12-0487-B-1 (2014), Pet. App. 30a-31a. That notice solely referenced review in the Federal Circuit. It did not discuss the possibility of district court review or of seeking a hearing at the EEOC under 29 C.F.R. § 1614.302. *See id.* The MSPB's appeal rights notice provided to Perry followed the MSPB's split decision in *Cunningham*. *See Perry*, Pet. App. 29a-30a at ¶ 11.

In *Cunningham*, the MSPB recognized that its prior practice of only notifying employees of their right to seek review in the Federal Circuit ran counter to *Kloeckner*. *See Cunningham v. Dept. of the Army*, 119 M.S.P.R. 147, ¶¶ 10-14 (2013). Despite this recognition, the MSPB majority still directed employees to the Federal Circuit and not the district court, even in cases alleging discrimination, if the MSPB determined that it lacked jurisdiction. *See id.* at ¶ 14. MSPB Vice Chair Wagner, in her concurrence, explained that under *Kloeckner* all employees who alleged discrimination should receive appeal rights, directing appeals to district court, not the Federal Circuit. *See id.* (Wagner, Vice Chair, concurring). *Amicus* requests that the Court confirm, consistent with *Kloeckner*, that the MSPB should include both the district court option and the EEOC administrative hearing option of 29 C.F.R. § 1614.302 in its notices of appeal rights for

all mixed cases (whether or not the MSPB finds jurisdiction).

CONCLUSION

For the foregoing reasons, the *amicus curiae* filing this brief in support of Petitioner Anthony W. Perry respectfully requests that this Honorable Court reverse the judgment of the United States Court of Appeals for the D.C. Circuit.

Respectfully submitted on March 3, 2017,

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